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No. 06-167

FILED

SEP 12 2006

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN, ANTHONY P. KANE, H. WILLIAMS, D.A. DACANAY, AND I.A. NIENHUIS,

Petitioners,

v.

ROMIRICO REMEIDIO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent's only serious argument is that no conflict exists among the circuit courts. However, the circuits are in broad disagreement over how to handle inmate-retaliation claims. They conflict on: (1) whether an adverse action against an inmate can be challenged as retaliatory even though the action is objectively legitimate; and (2) if so, what standards for pleading and proof of retaliatory causation apply. (Pet. 7-10; Br. Amici States 1-4.) By taking this case, the Court will be able to resolve these persistent conflicts in a manner that is consistent with *Turner v. Safley*, 482 U.S. 78 (1987), and *Hartman v. Moore*, 126 S. Ct. 1695 (2006).

I. There Is Widespread Conflict Among the Circuits Over How Courts Should Address Inmate-Retaliation Claims.

Although the circuits vary widely over how to adjudicate inmates' retaliation claims, Respondent denies the existence of *any* conflict among the circuits. (Opp. 5-10.) His key argument contends that the Eighth Circuit does not bar inmates from challenging objectively legitimate discipline (discipline supported by some evidence) in conflict with the ruling below. *See Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994); *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990). But the Eighth Circuit's rule is clear: when an inmate challenges a disciplinary violation as retaliatory, and there is "some evidence of the violation, the finding essentially checkmates his retaliation claim." *Henderson*, 29 F.3d at 469 (applying the some-evidence standard announced in *Superintendent v. Hill*, 472 U.S. 445 (1985), to hold that the retaliation claim failed). This is in stark contrast to the rule applied below,

which allows inmates to challenge objectively legitimate discipline as long as there is a dispute over the prison officials' subjective motive in administering the discipline.

In an attempt to explain away this conflict, Respondent contends that the Eighth Circuit's retaliatory-discipline cases, *Henderson* and *Orebaugh*, are distinguishable from the case here. (Opp. 6-7.) Specifically, he contends that the inmates' First Amendment expression in those cases was the same conduct for which they were disciplined, whereas Respondent was disciplined for conduct separate from the rules-violation charges. (Opp. 6-7.)

But Respondent's recitation of *Henderson*'s and *Orebaugh*'s facts is mistaken, regardless of Respondent's failure to show why such a difference would have eliminated the conflict. In *Henderson*, the inmate alleged that he was charged with assault in retaliation for requesting witnesses at a disciplinary hearing and reporting to the F.B.I. that prison officials harassed him. *Henderson*, 29 F.3d at 465-66, 469 (noting that the magistrate judge had denied the defendants' summary-judgment motion based on the inmate's contact with the F.B.I.). The inmate did not assert that his protected conduct was the assault itself; indeed, he disputed that he committed an assault. *Id.* at 466. And in *Orebaugh*, the inmate claimed that he was charged with violating a light-duty order in retaliation for filing a grievance about confiscated property. *Orebaugh*, 910 F.2d at 527. He did not allege that disobeying the light-duty order was protected conduct. Because the Eighth Circuit bars retaliatory-discipline cases if the

discipline was objectively legitimate, it squarely conflicts with the decision below.[1]

Respondent's argument also errs by contending that there is no real difference between the circuits that follow a burden-shifting standard (purportedly modeling the standard in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)), and those that follow a but-for test. (Opp. 9-10.) Here too, much of the argument is based on a misperception of the cases. For instance, he contends that *Peterson v. Shanks*, 149 F.3d 1140, 1144-45 (10th Cir. 1998), applied a but-for test in name only because it found "the retaliation claims to be wholly unsupported and 'speculative.'" (Opp. 10.) Although the court did state at one point that "Peterson's *remaining allegations* of retaliation are based on mere speculation," that was only after it analyzed several other retaliation claims under the but-for test in light of at least some evidence of retaliatory motive. *Id.* at 1143-45 (emphasis added) (noting the inmate's claim that the warden made explicit and menacing threats to him). Respondent also suggests that the First Circuit has not adopted the but-for test in *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981), because its reference to the test was mere dicta. (Opp. 9.) Respondent overlooks the case cited in *Layne*, *McDonald v. Hall*, 610 F.2d 16, 18-19 (1st Cir.

[1] The opposition also mistakenly cites *Cornell v. Woods*, 69 F.3d 1383 (8th Cir. 1995), for the proposition that the Eighth Circuit distinguishes between expressive conduct that violates prison rules and expressive conduct that does not. (Opp. 7.) *Cornell* makes no such distinction. But it does explain that the Eighth Circuit treats retaliatory-transfer cases differently from retaliatory-discipline cases. *Cornell v. Woods*, 69 F.3d at 1388-89. It addresses retaliatory-discipline cases under the some-evidence standard and retaliatory-transfer cases under the but-for test. *Id.*

1979), in which the First Circuit ordered the district court to apply the but-for test on remand.

In sum, the circuit conflict is widespread, as the petition and amici states explain. This Court's direction is needed to establish a single, uniform standard for inmate-retaliation cases that will eliminate the confusion among the lower courts and the disparity by which inmates' retaliation suits are decided across the circuits.

II. The Rule Applied Below Cannot Be Reconciled with *Turner v. Safley* or *Hartman v. Moore*.

A. *Turner v. Safley* Permits Objectively Reasonable Restrictions on Inmate Expression Regardless of Whether the Restrictions Are Imposed by a Prison Regulation or an Official's Independent Conduct.

The rule applied below conflicts with *Turner v. Safley*, 482 U.S. 78 (1987), because it allows inmates to challenge objectively legitimate state actions simply by casting doubt on the state actor's motivation. *Turner* does not instruct courts to fixate on officials' subjective motivations; instead, it tells courts to examine whether there is a "logical connection between the regulation and the asserted goal." *Id.* at 89. If the restriction is objectively reasonable, it withstands the test and is constitutional. *Id.*

Respondent tries to reconcile the decision below with *Turner* by positing that *Turner* applies only when an inmate's constitutional rights are restricted directly by a prison rule or regulation, not by an official's action apart from a regulation. (Opp. 11.) But this Court "made quite clear that the standard of review [it] adopted in *Turner* applies to all circumstances in which the needs of prison

administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). *But cf. Johnson v. California*, 543 U.S. 499 (2005) (holding that strict scrutiny applies to inmates' racial-discrimination claims). Thus, the courts of appeals have not hesitated to apply *Turner* to cases in which officials' conduct – rather than a regulation – is challenged. *E.g., Phelps v. Dunn*, 965 F.2d 93, 98-100 (6th Cir. 1992) (analyzing under *Turner* a homosexual inmate's claim that the prison chaplain and deputy warden excluded him from leadership roles in religious services); *Ali v. Dixon*, 912 F.2d 86, 89-91 (4th Cir. 1990) (holding under *Turner* that an inmate's religious rights were not violated when officers failed to call him by his newly adopted Muslim name).

It is true that this Court has only had opportunities to apply the *Turner* standard to cases in which prison rules or regulations were challenged. *E.g., Beard v. Banks*, 126 S. Ct. 2572 (2006) (reviewing restriction on high-security inmates' access to newspapers, magazines, and photographs); *Overton v. Bazetta*, 539 U.S. 126 (2003) (addressing prisoner-visiting regulations); *Shaw v. Murphy*, 532 U.S. 223 (2001) (considering regulation of inmate communication). But this is not surprising, since regulations control nearly every aspect of prison operations, and most inmate restrictions are thereby related to some rule or policy. Regardless, the Court's purpose in *Turner* was to establish a generally applicable legal standard. *Turner*, 482 U.S. at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." (internal quotation marks and citation omitted)). And this Court permitted objectively reasonable

restrictions on inmates' constitutional rights, thereby barring inmates from challenging reasonable restrictions by calling into question the officials' subjective motivations.

B. The Court's Rationale in *Hartman v. Moore* Counsels that Objective Reasonableness Should Be the Standard in Inmate-Retaliation Cases.

The decision below is also at odds with *Hartman v. Moore*, 126 S. Ct. 1695 (2006), which holds that if a criminal prosecution is objectively reasonable – that is, supported by probable cause – it cannot be challenged as retaliatory. The opposition attempts to discount *Hartman*'s significance simply by stating that it is not a inmate-retaliation case. (Opp. 11.) But this misses the point.

Unless inmate-retaliation cases are subject to an objective-reasonableness standard like retaliatory-prosecution cases, an odd incongruence occurs. Under *Hartman*, a free citizen who is charged with a criminal violation but later acquitted is barred from pursuing a retaliation claim as long as the criminal charge was objectively reasonable. *Hartman*, 126 S. Ct. at 1707. Yet under the rule applied below, a prisoner who is not only charged with, but also convicted of violating a prison rule, can challenge the conviction as retaliatory despite its objective legitimacy.

This incongruence transfers to the respective officers as well. The officer on the street who induced the criminal prosecution has his decision reviewed for objective reasonableness. *Id.* But the correctional officer who files disciplinary charges against a prisoner has his subjective motives probed regardless of how reasonable his action was –

indeed, even when the charges resulted in a conviction. This inconsistency is exacerbated by the fact that inmates are not limited to impugning officers' motives only when they are charged with a rules violation. Rather, they can bring retaliation suits nearly any time officers take adverse action against them. *E.g.*, *Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (holding that an inmate may bring a retaliation claim for any adverse action that would chill an inmate of ordinary firmness from exercising First Amendment rights in the future).

Such a result does not square with *Hartman*'s rationale. The Court explained in *Hartman* that in order to show causation in a retaliatory-prosecution case, the plaintiff must overcome the presumption of legitimacy that is afforded to prosecutorial decisions. *Hartman*, 126 S. Ct. at 1706. And it is appropriate to require the plaintiff to do this by showing a lack of probable cause because there is ordinarily ample evidence demonstrating whether probable cause existed. *Id.* at 1706. Likewise, this Court affords a high presumption of legitimacy to prison administrators' decisions because of the intractable challenges they must address. *Turner*, 482 U.S. at 84-85; *see also Hewitt v. Helms*, 459 U.S. 460, 474 (1983) (describing how administrators must be wary of subtle security threats that have potentially disastrous consequences). And also similar to the retaliatory-prosecution context, there exists a ready body of evidence to demonstrate whether there was a reasonable basis for adverse action against an inmate. Prisons keep their own extensive records, and under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prisoners must exhaust their administrative remedies before filing suit, creating even more-detailed documentation concerning the adverse action.

For these reasons, prisoners who bring retaliation claims should be required to plead and prove an absence of objective reasonableness in the same way that retaliatory-prosecution plaintiffs must plead and prove a lack of probable cause.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Dated: September 12, 2006

Respectfully submitted,

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